

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERNEST ARSENIO ALLEN,

Defendant-Appellant.

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UNPUBLISHED

March 22, 2005

No. 252547

Wayne Circuit Court

LC No. 03-004203-01

Before: Meter, P.J., and Bandstra and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of second-degree murder, MCL 750.317, assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to imprisonment for 18 years and 9 months to 40 years for the second-degree murder conviction, 10½ to 30 years for the assault with intent to murder conviction, and two years for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court abused its discretion in admitting officer Donald Olsen's testimony that Willie Fonvilee told him that he saw defendant pass a gun to his codefendant, Maurice Allen. According to defendant, Olsen's testimony was unreliable and inadmissible hearsay, and its admission deprived defendant of his right to a fair trial. We disagree.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Drohan*, 264 Mich App 77, 84; 689 NW2d 750 (2004). "An abuse of discretion exists if an unprejudiced person would find no justification for the ruling made." *Id.*, quoting *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). A trial court's decision on a close evidentiary question does not amount to an abuse of discretion. *People v Geno*, 261 Mich App 624, 632; 683 NW2d 687 (2004).

Hearsay is defined as a statement, other than one made by the declarant while testifying at a trial or hearing, which is offered in evidence to prove the truth of the matter asserted. MRE 801(c); *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997). Hearsay is generally not admissible as substantive evidence, except as provided for in the Rules of Evidence. MRE 802; *Tanner*, *supra* at 629. Under MRE 801(d)(1)(B), the prior consistent statement exclusion to the hearsay rule, a prior statement of a witness is not hearsay when he testifies at the proceeding,

is subject to cross-examination concerning the statement, the statement is consistent with his testimony and the statement is offered to rebut a charge of express or implied recent fabrication, improper influence or motive. *People v Fisher*, 220 Mich App 133, 154; 559 NW2d 318 (1996). To be admissible as rebuttal to a suggestion of recent fabrication, a prior consistent statement must have been made before the motive to fabricate arose. *People v Jones*, 240 Mich App 704, 708-709; 613 NW2d 411 (2000).

Here, the testimony in question is Olsen's testimony that when he interviewed Fonvilee just hours after Allen shot and killed the victim, Fonvilee told him that he saw defendant pass a gun to Allen. We find that Olsen's testimony was admissible under the prior consistent statement exclusion to the hearsay rule. MRE 801(d)(1)(B). First, Fonvilee testified at trial and was subject to cross-examination. Second, Fonvilee's prior statement was consistent with his trial testimony. Finally, since defense counsel vigorously cross-examined Fonvilee regarding a prior inconsistent statement that he made at the April 1, 2003, preliminary examination, in which Fonvilee stated that he was not sure what defendant handed to Allen, the prior consistent statement rebutted defense counsel's implied charge of recent fabrication. We therefore find that the trial court did not abuse its discretion in admitting Olsen's testimony as evidence under MRE 801(d)(1)(B).

Defendant next argues that there was not sufficient evidence to sustain his second-degree murder conviction. Specifically, defendant contends that because there was evidence that the killing was provoked, the prosecution failed to establish that defendant acted with malice. We disagree.

The prosecution must introduce evidence sufficient to justify a rational trier of fact in concluding that all of the essential elements of the crime were proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). When reviewing a challenge to the sufficiency of the evidence, this Court must examine the evidence in the light most favorable to the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Circumstantial evidence and the reasonable inferences arising from it may constitute sufficient evidence of the elements of a crime. *People v Bulmer*, 256 Mich App 33, 37; 662 NW2d 117 (2003).

The elements of second-degree murder are: (1) a death, (2) caused by the defendant's act, (3) with malice, and (4) without justification. *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003). Malice requires an intent to kill, an intent to do great bodily harm, or an intent to create a high risk of death or great bodily harm with knowledge that such is the probable result. *People v Neal*, 201 Mich App 650, 654; 506 NW2d 618 (1993). Manslaughter is murder without malice. *Mendoza, supra* at 534. Voluntary manslaughter requires that the defendant killed in the heat of passion, that the passion was caused by adequate provocation, and that there was not a lapse of time during which a reasonable person could control his passions. *Id.* at 535. Provocation is not an element of voluntary manslaughter; rather, provocation is a circumstance that negates the presence of malice. *Id.* at 535-536. A person who intentionally assists another person in committing a crime is as guilty as the person who directly commits it and can be convicted of those crimes as an aider and abettor. *People v Coomer*, 245 Mich App 206, 223; 627 NW2d 612 (2001). To convict a person of aiding and abetting a crime, a prosecutor must show: (1) that the crime charged was committed by the defendant or some other person, (2) that the defendant performed acts or gave encouragement which assisted in the commission of the crime, and (3) that the defendant intended the commission of the crime or had knowledge of the

other's intent at the time he gave the aid and encouragement. *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004).

Viewing the evidence in a light most favorable to the prosecution, a rational jury could conclude that defendant aided and abetted Maurice Allen in committing second-degree murder. Allen fired a gun in the direction of Rudolph Bradley, an individual with whom Allen had had prior altercations. A bullet from Allen's gun hit China Jones, the victim, and caused her death. Allen's actions were not justified by self-defense because he admitted that Bradley never pointed a gun at him and that he could have turned around and returned to the vehicle he arrived in and asked the driver to leave. There was no evidence that anyone else possessed a gun. Defendant contends that because there was evidence of provocation, defendant should have been convicted of manslaughter, not murder. The most recent alleged provocation between Allen and Bradley occurred about one week before Allen shot the victim, and thus, there was a lapse in time in which a reasonable person could have cooled his blood and controlled his passions. There was therefore no provocation. We conclude that Allen's actions of pointing a gun and shooting it in Bradley's direction did not constitute manslaughter because Allen acted with malice and was not provoked. Malice may be inferred from the use of a deadly weapon. *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999). Because there was sufficient evidence to convict Allen of second-degree murder as well as evidence that defendant assisted Allen in the murder by handing Allen a gun, we conclude that the prosecution presented sufficient evidence to permit a rational trier of fact to conclude that defendant aided and abetted Allen in committing second-degree murder.

Defendant finally argues that he was denied a fair trial when the trial court permitted the prosecutor to introduce other acts evidence under MRE 404(b). According to defendant, Fonvilee's testimony that he observed defendant with a gun a week and a half before the victim was shot should have been excluded because it was not admitted for a proper purpose under MRE 404(b)(1), because it was more prejudicial than probative under MRE 403, and because the prosecutor failed to give notice of his intent to use other acts evidence as required by MRE 404(b)(2). We disagree.

While the decision to admit evidence is within a trial court's discretion and will not be reversed absent an abuse of discretion, when the decision to admit evidence involves a preliminary question of law such as whether a rule of evidence precludes the admission of the evidence, our review is de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith, but may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity or absence of mistake or accident, whether the crimes, wrongs or acts are contemporaneous with or prior or subsequent to the conduct at issue. MRE 404(b)(1). The purpose of the limitation on the admissibility of other acts evidence is to avoid convicting a defendant based upon his bad character rather than upon evidence that he is guilty beyond a reasonable doubt of the crime charged. *People v Crawford*, 458 Mich 376, 384; 582 NW2d 785 (1998). The list of proper purpose exceptions in MRE 404(b)(1) is not exhaustive. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). A proper purpose is any purpose other than one establishing the defendant's character to show his propensity to commit the charged offense. MRE 404(b)(1); *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114

(1993), amended 445 Mich 1205 (1994). If a proper purpose is shown, other acts evidence is admissible if the evidence is relevant and has probative value that is not substantially outweighed by unfair prejudice. *Sabin, supra* at 56-58.

Defendant argues that Fonvilee's testimony that slightly more than a week before the victim's murder, he saw defendant with the same gun that he saw defendant give to Allen on the day the victim was shot and killed, should have been precluded under MRE 404(b). We disagree. Fonvilee's testimony was not offered to prove defendant's propensity to commit the charged crimes, but to prove that the gun used to murder the victim was the same gun that was observed in defendant's possession a week and a half before the murder. Defendant disputed the fact that Allen used his gun to murder the victim. Therefore, Fonvilee's testimony was relevant to connect the murder weapon to defendant and to refute defendant's claim that Allen did not use his gun to commit the murder. Moreover, we reject defendant's contention that Fonvilee's testimony was substantially more prejudicial than probative and should have been precluded under MRE 403. Unfair prejudice means more than merely that the evidence is damaging to the opposing party. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Fonvilee's testimony was probative on the issue of whether defendant aided and abetted Allen in committing second-degree murder. We conclude that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice because it would not tend to cause the jury to make a decision on an improper basis and there was no danger that it would be given undue or preemptive weight by the jury. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995); *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2002). Because Fonvilee's testimony was relevant, was not unfairly prejudicial, and was not offered to prove defendant's propensity to commit the charged offenses, we conclude that it was admitted for a proper purpose under MRE 404(b)(1). The trial court did not abuse its discretion in admitting the testimony.

Moreover, we conclude that the trial court did not err in holding that the prosecutor provided proper notice under MRE 404(b)(2). The prosecution must give reasonable pretrial notice of its intent to introduce prior acts evidence at trial, or during trial if the court excuses pretrial notice on good cause shown, and the trial court may require the defendant to articulate his theories of defense. MRE 404(b)(2); *VanderVliet, supra* at 89. The purposes of the notice requirement are to require the prosecutor to identify and seek admission only of relevant prior acts evidence, to ensure that the defendant has an opportunity to object to and defend against the evidence, and to facilitate a thoughtful ruling by the trial court grounded in an adequate record. *People v Hawkins*, 245 Mich App 439, 454-455; 628 NW2d 105 (2001). In this case, the evidence was relevant and was not substantially more prejudicial than probative. Furthermore, defendant had the opportunity to and did, in fact, object to the evidence. Therefore, any lack of notice was harmless error. *Id.*

Affirmed.

/s/ Patrick M. Meter  
/s/ Richard A. Bandstra  
/s/ Stephen L. Borrello